IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 932 OF 2004

M/s. Wellwin Mercantile Co.P.Ltd. .. Petitioner.
v/s.
Mr. Gomji Kacharu Thorat .. Respondent

Mr. Shekhar Naphade with Mr. N.N. Bhadrashete for the petitioner.

Mr. D.D. Madon i/b. S. Satpute and Co. for the respondents.

CORAM: S.U. KAMDAR. J.

DATE : 22ND DECEMBER, 2004.

P.C. :

1. Admit. Returnable forthwith. With the consent of the parties Arbitration Petition taken up for hearing and final disposal. The present petition is filed under section 9 of the Arbitration and Conciliation Act, 1996(hereinafter referred to as the said act of 1996) for interim reliefs. Some of the material facts of the present case are as under :

2. Under an agreement dated 13.1.2004 the petitioner and the respondents agreed that the development of the plot of land bearing survey no. 164 admeasuring about 28 acres 10 Gunthas situated at Kandivali (west), Village-Borivali will be carried out by the petitioner on terms and conditions set out therein. Under the terms and conditions of the said agreement the petitioner herein was required to make payment of the total sum of Rs.15 crores as provided under the schedule of payment annexed to the said agreement. The terms of the payment prescribed under the schedule of payment provided that Rs.25,00,000/- to be paid on or before the execution of the said agreement. It is an admitted position that the aforesaid amount is already been paid by the respondent to the petitioner herein. A further sum of Rs.2.00 crores was to be paid as soon as the respondents get clear title and get their names recorded in the revenue records maintained by the State Government and that the further balance sum of Rs.12.75 crore was payable on expiry of 1 month from the payment of second instalment of Rs.2.00 crore. The said amount of Rs.12.75 crore was payable in the

period of five years with twenty instalments.

3. It is an admitted position before me that the sum of Rs.25,00,000/- has been paid. However, it is the case of the petitioner that over and above the said amount of Rs.25,00,000/- the petitioner gave post-dated cheques for the subsequent amount though under the terms and conditions of the said agreement, the same was not payable. It is the case of the petitioner that the aforesaid cheques were given by the petitioner so as to secure the payment of the balance of the amount. However, the respondent company deposited the said cheques and encashed a further sum of Rs.10,00,000/- which is covered by the cheque bearing no. 029401 dated 12.4.2004

4. The respondent by the letter dated 15.10.2004 inter-alia pointed out that the cheques for an amount of Rs.7.5 lakhs given by the petitioners were deposited but the cheques are returned unpaid. According to the respondent, in view thereof the petitioner has committed breach of the terms and conditions of the said agreement dated 13.1.2004 and

thus the respondent purported to terminate the said agreement. The respondent also threatened the petitioner that a criminal complaint will be filed in respect of the cheque so dishonoured. On 6.12.2004 the petitioner sent a reply to the said letter dated 15.10.2004 and pointed out that the said amount was not due and payable. Infact the petitioner has paid the petitioner amount of Rs.10,00,000/- though under the terms and conditions of the schedule of payment, the balance of the amount is due and payable only after the petitioner get their names inserted in the revenue records maintained by the land officers.

5. However, the differences and disputes between the parties did not work out and accordingly by a letter dated 14.12.2004 the petitioner invoked the arbitration clause contained in the said agreement. Clause-19 of the said agreement provided for an arbitration of one Shri. R.S. Narula in an event of differences and disputes between the parties. The said clause-19 of the agreement reads as under :

19. It is further agreed that if any

> dispute is arised under this agreement between the party of the First part and the Party of the Second Part, the matter will be referred for arbitration to an Arbitrator. It is mutually agreed that Arbitrator will be Shri R.S. Narula S/o. N.S. Narula r/o. 1101, Beach Classic, Versova, Andheri(west), Mumbai-400 053. This appointment of arbitrator is irrevocable.

6. In response to the said letter the said Mr. R.S. Narula has accepted to act as an arbitrator and the arbitration proceedings has thus commenced under section 21 of the said Act of 1996 and the same are pending.

7. The petitioner has in the meantime, filed the present application under section 9 of the said Act of of 1996 inter-alia seeking interim relief of an appointment of Court Receiver, High Court, in respect of land bearing survey no. 164, CTS-1110 admeasuring 28 Acres 10 Gunthas situated at village Kandivali, Taluka-Borivali, Bombay-67. The petitioner has also claimed an interim injunction restraining the respondent from alienating, encumbering or creating any third party rights in respect of the suit

property.

8. This petition under section 9 of the said Act of 1996 has been resisted by the learned counsel for the respondents who has inter-alia contended before me that there has been a novatio in respect of the agreement dated 13.1.2004 entered between the petitioner and the respondent herein. According to the learned counsel for the respondent though the schedule of the payment of the agreement provides that the amount will be paid only after the names of the respondent is brought on revenue records. However, the said agreement was subsequently modified and the said requirement was given a go-bye. According to the learned counsel for the petitioner this fact is evident from the averments made in the petition itself and he draws my attention to paragraph-5 of the said petition. He further inter-alia contends that the averments made therein indicates that there is new and or modified agreement which is arrived at between the parties in variance to the written agreement in so far as it pertains to schedule of payment and therefore there is a breach by non-payment of instalments on due

dates by the Petitioner. The learned counsel further contended that from the statements made in paragraph no.5 of the petition it is an admitted position that for the balance amount of Rs.14,75,00,000/- the cheques were given which itself indicates that on the due date mentioned on the said cheques the amount had become due and payable. Thus non-payment of the amounton the said due dates is a breach on the part of the petitioner and therefsore they are entitled to any interim measures as prayed for in the present petition. It is thereafter contended by the learned counsel for the respondent that if the cheques are merely to be given as security and therefore post dated cheques are issued and were to be encashed only after the names of the petitioner is broken on the land records, then, in that event the petitioner shall not give the cheque of a specific date. However the fact that the cheques are given of a specific date indicates that a modified arrangement has been arrived at and infact under the new arrangement the instalment becomes due and payable as on the date of the said cheques.

9. Prima-facie I am unable to accept the contention of the learned counsel for the respondent. Merely because post-dated cheques are given does not in my view necessarily indicate that there has been a novatio and or modification of an earlier written agreement dated 13.4.2004. It is well settled that where there is a written agreement no evidence contrary to the terms thereof by way of oral evidence and/or arrangement can be adduced or submitted. In any event I am at the interim stage and prima-facie I find that the petitioners have complied with the obligations under the said contract. According to me the petitioners under payment schedule were not liable to make payment save and except of initial amount of Rs.25 lakhs because the balance amount has not become due and payable since the condition prescribed therein for the same is not fulfiled by the respondents. In view thereof, it is not possible to accept the argument of the learned counsel for the respondent that there is a breach on part of the petitioner herein. I am also unable to read any novatio in paragraph-5 of the petition. The said paragraph of the petition nowhere pleads novatio and or new or

modified arrangement. It is equally settled position in law that new arrangement is to be pleaded in specific and cannot be merely inferred from various facts and circumstances when there is written document on record. In light thereof, I am not impressed with the contention raised by the learned counsel for the respondent herein.

10. The learned counsel for the respondent company has thereafter contended that the property should not be freezed by interim orders at this stage at the behest of the petitioner because the petitioner has admittedly paid only a sum of Rs.35,00,000/- . The property is of a much larger value and therefore the same should not be freezed by interim orders passed in the present petition. He offered that he will deposit a sum of Rs.35.00 crores in court and the respondent should be permitted to deal with/ and or dispose of the said property. This contention also I am unable to accept at the interim stage. It is not possible for a vendor to reegal out the solemn contract entered into by him by offering that the amount received under the said two cheques would be deposited by him in this

court and therefore the property should not be freezed. Once I come to a prima-facie conclusion that there is a valid and binding agreement between the parties, then in that event it would not be possible for me to refuse the grant of interim reliefs to the petitioner to protect their rights which may be established in the course of the arbitration proceedings. In the aforesaid circumstances, I make the petition absolute in terms of prayer clause (a) excluding the word ‘dealing with’ which is bracketed in red ink in prayer clause (b). The petition is disposed of accordingly with no order as to costs.

sd/-

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